Remarks of Senator Charles Grassley on the False Claims Act
February 13, 2018
(unofficial transcript)

I'm going to address, as I do often on the floor, problems with the False Claims Act.

As author of the False Claims Act of 1986, I want to up front, before I talk about some problems, that this is a piece of legislation that is brought into the federal treasury $56 billion to $57 billion of fraudulently taken money.

Each year the department of justice updates the amount of money that comes in under the false claims act of about $3 billion to $4 billion a year.

So we're talking about a piece of legislation that I got passed more than 30 years ago that had been good for the taxpayers to make sure that their money is handled the way the law requires.

And obviously if it's taken fraudulently, it's not handled the way that the taxpayers would expect.

So with that introduction, I want to bring up some problems with the false claims act.

Today there are some troubling developments in the court's interpretation of the false claims act.

To understand these developments, I want to review a little history.

In 1943, congress gutted the Lincoln era law known as the False Claims Act. At that time, during World War II, the Department of Justice said that it needed no help from whistleblowers to fight fraud. The Department of Justice said that if the government already knows about the fraud, then no court should even hear a whistleblower's case.

So congress amended in 1943 the False Claims Act to bar any whistleblower from bringing a claim if the government knows about the fraud.

Now, way back in World War II, looking back, we know that was a big, big mistake what they did to the False Claims Act because the [government knowledge] bar led to uncertain results that will only hurt the taxpayers.

It basically meant that all whistleblower cases were blocked, even cases where the government knew about the fraud because of the whistleblowers.

In other words, whistleblowers are patriotic people when they are reporting fraud, but it didn't make any difference because of the way the law was amended in 1943.

In 1984, the Seventh Circuit barred the State of Wisconsin from a whistleblower action against Medicaid fraud.

Even today Medicaid fraud is a major problem. We have ways of getting at it now, but in 1984 they didn't. In this case of Wisconsin, that state had already told the federal government about the fraud because it was required to report that fraud under federal law. So because of the so-called government knowledge bar enacted in 1943, whistleblower cases went nowhere and neither did prosecution of wrongdoers.

So getting back to what I was involved in this 1986, I worked with many of my colleagues, particularly a former congressman -- democratic congressman from California by the name of Mr. Berman, to make it possible for whistleblowers to be heard again.

In other words, these patriotic Americans that just want the government to do what the law says it ought to be doing and money is spent the way it ought to be spent, they want -- they want people to know about it so action can be taken.

So in 1986, for whistleblowers to be heard again, that included eliminating this so-called government knowledge bar.

Since then, what the government knows about fraud has still been used by defendants in false claims cases as a defense against their own state of mind. Courts have found that what the government knows about fraud can still undercut allegations that defendants knowingly submitted false claims. The theory goes something like this.

If the government knows about the defendant's bad behavior and the defendant knows that the government knows, then the defendant did not knowingly commit fraud.

Now, that doesn't make sense, does it?

Once you wrap your head around that logic puzzle, I've got another one for you.

In 2016, the question of what the government knows about fraud and false claims act cases began to take center stage once again.

In Escobar, the Supreme Court rightly affirmed that a contractor can be liable under the "implied false certification" theory. Implied false certification, quotation marks around that. That just means a contractor can be in trouble when it doesn't make good on its bargain. And it doesn't matter whether the contractor outright lies; a misleading omission of its failures is enough.

Unfortunately, parts of the Court's ruling are getting some defendants and judges tied in knots.

Justice Thomas wrote that the false or misleading aspect of the claim has to be material to the government's decision whether the government paid it.

Thomas said that one of several ways that you can tell whether something misleading is also material is if the government knows what the contractor's up to and pays the claim anyway. Now, that's a good way for people just to commit fraud and commit fraud. At first glance I suppose that kind of makes sense. If someone gives you something substantially different in value or quality than what you asked for, why would you pay for it? But if the difference really isn't that important, you still might accept it.

Even if that is true, the problem here is that courts are reacting the way they always have. They're trying to outdo each other and applying Justice Thomas's analysis inappropriately or as strictly as possible to the point of absurdity. In doing so, they're starting to resurrect elements of that -- elements of that old government knowledge bar that I worked so hard to get rid of in 1986.

And remember that government knowledge bar goes back to the big, big mistake that Congress made in 1943 by [including it in] the False Claims Act.

This is what Justice Thomas actually wrote.

Quote, if the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, this is very strong evidence that those requirements are not material.

Or if the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated and has signaled no change in position, that is strong evidence that the requirements are not material. End of quote.

Now, Justice Thomas did not say that in every case if government pays a claim despite the fact that someone somewhere in the bowels of the bureaucracy might have heard allegations

that the contractor might have done something wrong, the contractor is automatically off the hook.

Think about that. Why should the taxpayer pay the price for bureaucrats who fail to expose fraud against the government?

That's why the False Claims Act exists, to protect taxpayers by rewarding whistle-blowers for exposing fraud.

Justice Thomas said that the government's actions when it has actual knowledge that certain requirements were violated are evidence of whether those requirements are material or not.

What does it mean for the government to have actual knowledge? Would it include one bureaucrat who suspected a violation but looked the other way? Would that prove the requirement was material? Courts need to be careful here. First, this statement about government knowledge is not the standard for materiality.

The standard for materiality is actually the same as it has always been.

The court did not change that definition . . . in Escobar.

Materiality means, quote, having a natural tendency to influence or being capable of influencing the payment or receipt of money or property. End of quote.

The question of the government's behavior in response to fraud is one of multiple factors for courts to weigh in when applying the standard.

Second, courts and defendants should be mindful that Justice Thomas limited the relevance here to actual knowledge of things that actually happened. There are all sorts of situations where the government could have doubts, but no actual knowledge of fraud.

Maybe the government has only heard vague allegations but has no facts.

Maybe the rumors are about something that may be happening in an industry but nothing about particular false claims by a particular defendant.

Maybe an agency has started an inquiry but still has a long ways to go before that inquiry is finished.

Maybe someone with real agency authority or responsibility hasn't learned of it yet. There are a lot of situations where the government might not have actual knowledge of the fraud.

Third, even if the government does pay a false claim, that is not the end of the matter. Courts have long recognized there are a lot of reasons why the government might not intervene in a whistle-blower case.

And there are a lot of reasons why the government might still pay a false claim. Maybe declining to pay the claim would leave the patients without prescriptions or life-saving medical care. Paying the claims in that case does not mean that fraud is unimportant. It means that in that moment, the government wants to ensure access to critical care. That payment cannot and does not deprive the government of the right to recover the payment obtained through fraud.

Can you imagine if that were the rule? Can you imagine if providers could avoid all accountability because the government decided not to let someone suffer? Then fraudsters could hold the government hostage. They could submit bogus claims all the time with no consequences because they know the government is not going to deny treatment to the sick and the vulnerable.

That is just not what the False Claims Act says. Courts should not read such a ridiculous rule into that statute.

Fourth, courts should take care in reading into the act a requirement for the government to immediately stop paying claims or first pursue some other remedy. There could be many important reasons to pay a claim that have nothing to do with whether the fraud is material.

Further, there is no exhaustion requirement. The False Claims Act does not require the government to jump through administrative hoops or give up its rights. And that would be an unreasonable burden on the government in any event.

We have decades of data showing that the government cannot stop fraud by itself. Hence, the importance of whistle-blowers. Hence, the importance of the False Claims Act.

I also know for many years of oversight, that purely administrative remedies are not very time consuming and often toothless. The government should be able to decide how best to protect the taxpayers from fraud.

The False Claims Act is the most effective tool the government has. The government should be able to use it without the courts piling on bogus restrictions that are just not law.

Where I started, the importance of the False Claims Act. It's brought in $56 billion to $57 billion into the federal treasury since its enactment in 1986. Each year the department of

justice updates the law, usually reporting three or four -- $3 billion or $4 billion coming in under that Act in the previous year. I hope the courts understand that every bureaucrat in government has to have the opportunity to report what's wrong so that we make sure that the taxpayers' money is properly spent.

I yield the floor and suggest the absence of a quorum.